IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.174 OF 1990

The State of Maharashtra .. Appellant
(Orig.Complt.)

Versus

1. Prabhat @ Bhai Narayan Wagh
2. Meghnath Ganpat Dhuri
3. Vidhyadhar Sitaram Malkar
4. Uday Tukaram Talgaonkar
5. Hanumant Atmaram Deulkar
6. Appa Gopal Malankar
7. Tulsidas Jagannath Ludbe
8. Diwakar Harishchandra Joshi
9. Krishna Dhondu Gavade .. Respondents
(Orig.Accd.Nos.1 to 9)

Shri P.S. Hingorani APP for the State
Shri Satish Maneshinde with Sachin B. Shetye Advocate for Respondent Nos.2, 4 to 6 and 8.

CORAM : D.G. DESHPANDE, & S.R. SATHE,JJ.
DATED : 29th March, 2007

ORAL JUDGEMENT :- (PER S.R.SATHE,J.)

1. The State of Maharashtra has preferred this appeal against the judgement and order passed by the Court of Additional Sessions Judge, Sawantwadi in Sessions Case No.7 of 1989 whereby the accused No.1 and 3 to 9 were acquitted of the offences punishable under sections 120-B, 147, 452 r/w. 149, 452 r/w. 34, 302 r/w. 149, 302 r/w. 34, 324 r/w. 34, 201 r/w. 34 of IPC and accused Nos. 1 and 2 were also acquitted of the

offences punishable under sections 201 of IPC, in a case where deceased was murdered in ghastly and gruesome manner.

2. The brief facts giving rise to this appeal are as under :-

Deceased Sanjay Dinkar Gaonkar was residing at Malwan in the area known as Revatala. The accused Nos.1,2, 4 to 9 were residents of Malwan at the relevant time and accused Nos.3 and 9 were residing at village Nandos and Bombay respectively. Admittedly, there was rivalry between Sanjay Gaonkar on one side and accused persons on the other side.

3. On 19/10/1987, at about 7.30 pm deceased Sanjay Gaonkar and his two friends namely PW-8 Anil Raut and PW-15 Rajan Angane were chit-chating in front of Kishor Cycle Mart at Bharad Naka, Malwan. At that time, complainant Suryakant Ramchandra Phansekar a resident of Malwan having his house in the area known as Vaiery had gone to a saloon owned by PW-3 Vijay Chavan. The said saloon was situated just in front of Kishor Cycle Mart. The complainant had gone to the said shop for reading newspaper. It was his usual practice to visit the said shop for reading newspaper. On the day of

incident at about 7.30 pm, when complainant was in the said shop, all of a sudden he heard voice of "पळा-पळा" (run-run). Naturally, he just went out side the said shop and he found that deceased Sanjay Gaonkar was running towards the house of Shobhana Parkar which was very near from the said saloon and the accused No.1 Bhai Wagh, accused No.3 Vidhyadhar Malkar, accused No.7 Tulsidas Lubde were chasing him with weapons like gupti and sword in their hands. When the deceased Sanjay Gaonkar was about to enter the said house, accused No.1 gave a blow with weapon like gupti on the neck of Sanjay and he fell on the ground. Thereupon, other two accused persons also assaulted Sanjay with weapons which were in their hands. Immediately, thereupon, complainant rushed to Malwan Police Station and informed them about the incident and requested for police help. The police head constable Parab who was present in the Police Station asked the complainant Suryakant Phansekar to give his complaint in writing. The complainant therefore gave writing Exh-28 wherein he stated that persons of Divakar Joshi entered the house and assaulted complainant's friend Sanjary Gaonkar and he saw Bhai Wagh and other 5-6 persons and they weer having sword, gupti in their hands and they assaulted Sanjay at the said place. On the basis of the

said writing Station Diary Entry No.292 was made and Police proceeded to the place of offence. They found that deceased Sanjay was lying in a pool of blood just inside the door of house of Shobhana Parkar. According to the Prosecution, even Shobhana Parkar had also received injury to her arm when she had tried to intervene. By the time, police reached the place of offence, the accused had disappeared from the said place. After reaching at the place of offence, Police again made query with complainant and then complainant was taken to the Police Station and his detailed complaint was recorded by the Police Station Officer. On the basis of the said complaint (Exh-27) Police registered the offence at C.R. No.81/87. On the next day, Police drew the inquest panchanama of the dead body of Sanjay Gaonkar and sent his dead body for postmortem. They also drew the panchanama of the place of offence. Police then recorded the statements of some witnesses and arrested the accused No.1 on 20/10/1987 at his house. At that time, accused was wearing reddish colour lungi and shirt. Police attached the same under the panchanama as there were some blood stains. When accused No.1 was in the police custody, on 22/10/1987, he made a statement before police that he would produce the gupti like sword concealed in the bushes and police

therefore recorded his statement in presence of panchas and then accused No.1 took police and panchas to the side of seashore and from the bushes, he produced one gupti like sword having length of about 2'. Police attached the said gupti under the panchanama. Police then arrested other accused persons and also attached the clothes of the deceased. Police sent all the articles attached during the investigation to C.A. After completion of the investigation, they submitted charge-sheet against the accused in the Court of JMFC,Malwan for the offences mentioned above.

4. Finding that the accused were charge-sheeted for the offence punishable under section 302 of IPC which was exclusively triable by the Court of Sessions, the learned JMFC committed the case to the Sessions Court, Sawantwadi.

5. The learned Additional Sessions Judge Sawantwadi framed charge Exh-1 against the accused for the offences mentioned above. The charge was read over and explained to the accused. All the accused pleaded not guilty and claimed to be tried.

6. In order to prove the charge levelled against

the accused, the Prosecution examined as many as 20 witnesses. They can be divided in four groups :-

First group is of eye witnesses viz.:-

PW-4 complainant Suryakant Ramchandra Phansekar Exh-26,

PW-8 Anand @ Anil Murari Raut Exh-33,

PW-15 Rajan Waman Angane Exh-51,

PW-16 Sudhir Maruti Manjarekar Exh-52.

The other group is of Pancha Witnesses viz.

PW-1 *Sunil Bapu Ravale Exh-19 who acted as pancha for article panchanama,*

PW-2 *Rajaram Gopal Girkar Exh-21 Pancha regarding discovery,*

PW-3 *Vijay Sitaram Chavan Exh-23 pancha for place of offence and attachment of clothes of accused No.1.*

PW-5 *Murari Vasudev Sarang Exh-29,*

PW-12 *Ashok Keshav Gaonkar Exh-40 who acted as pancha for discovery panchanama,*

PW-13 *Yashawant Balkrishna Hadkar Exh-42 who acted as pancha when accused No.2 showed the place where clothes were burnt.*

The third group is of other witnesses viz.:-

PW-6 *Dilip Sadashiv Girkar Exh-31,*

PW-7 *Diwakar Vasant Amberkar Exh-32,*

PW-9 *Atmaram Bapu Bhogate Exh-37,*

PW-10 *Rajan Vasant Mayekar Exh-38,*

PW-11 *Dattaram Umaji Khavanekar Exh-39,*

PW-14 *Pandurang Shantaram Jadhav Exh-45.*

The Prosecution has examined in all four police officers namely :-

PW-17 *Police Head Constable Mahadev Jairam Morje Exh-53,*

PW-18 *Sub-Inspector Shashikant Dhondu Bandarkar who carrying out the investigation for some time Exh-55,*

PW-19 *PSI Bhalchandra Yashwant Salvi Exh-65, he also carried out some investigation,*

PW-20 *Circle Inspector Kamalakar Shankarrao Kamat Exh-69 who took the investigation of the case on 26/10/1987.*

7. The Prosecution also produced certain documents such as writing, giving information about the incident Exh-27, FIR Exh-28, Inquest Panchanama Exh-20, Panchanama regarding the clothes of the deceased Exh-22, Panchanama of place of offence Exh-24, memorandum and discovery panchanama regarding gupti produced by accused No.l Exh-41 and 25 respectively. Panchanama regarding pointing out the place where the clothes were

burnt and attachment of ash and burnt pieces of clothes Exh-43 and 44 respectively. Medical Certificate as to cause of death Exh-47, Postmortem Report Exh-48 and C.A. Report Exh-70 and 71. As against this, The accused did not lead any defence evidence. From the suggestions put to the prosecution witnesses and from the statement of accused recorded as per section 313 of the Criminal Procedure Code, it appears that defence of the accused was of total denial. According to them they were falsely implicated in the said case. It is the case of accused No.2 and 3 that at the relevant time, they were not even at Malwan.

8. After considering the Prosecution evidence and hearing the arguments of both the learned Advocates, the learned Trial Judge came to the conclusion that the Prosecution has proved that the death of Sanjay Gaonkar was homicidal. However, according to him there were several discrepancies and contradictions in the evidence of the alleged eye witnesses. There were lacunas in the investigation and thus, it was necessary to extend the benefit of doubt to the accused. He, therefore, acquitted all the accused of the charges levelled against them.

9. Being aggrieved by the said judgement and order the State has filed the present appeal. In this appeal before us Shri Hingorani, learned APP has urged 3 points. Firstly, he submitted that learned Trial Judge has not properly appreciated the evidence on record and has given undue importance to minor discrepancies and contradictions. Secondly, he canvassed before us that learned Trial Judge ought to have taken into consideration the fact that information about the incident was given to Police by the complainant immediately and names of at least accused Nos.1,3 and 7 were disclosed in the same and it was also stated that they assaulted Sanjay Gaonkar with deadly weapons. Lastly, the learned APP strenuously argued before us that the learned Trial Judge ought to have considered the fact that there are as many as four eye witnesses who have corroborated the Prosecution version and they have not in fact made any attempt to rope all the accused but given true account of what they had seen. He, therefore, submitted that the appeal be allowed and order of acquittal be set aside and at least accused Nos.1,3 and 7 be convicted for the offences with which they are charged.

10. As against this, Shri Maneshinde, learned

Advocate for the accused supported the judgement and order passed by the learned Trial Judge. He submitted that Exh-27 is in fact not the FIR but Exh-28 appears to have been given by the complainant first in time. According to him, the same is also fabricated. But even if it is accepted, there is no mention of the names of all the accused and only the name of accused No.1 is mentioned but no overt act has been attributed to him. He also submitted that considering the discrepancies and contradictions in the evidence of eye witnesses, the learned Trial Judge has rightly rejected their evidence. Lastly, he submitted that even if it is assumed that the evidence on record can be appreciated in a different manner still that by itself is not sufficient to allow the appeal as it is well settled that if the view taken by the Trial Court is a possible view and reasonable one, the Appellate Court should not interfere with the finding of acquittal. He, therefore, submitted that the appeal be dismissed.

11. It is not in dispute that the deceased, accused and the prosecution witnesses are basically residents of Malwan. Admittedly, they were known to each other since prior to the date of offence. It is not even disputed that the accused and the prosecution witnesses

belong to rival political groups and there was rivalry between deceased Sanjay on one hand and the accused persons on the other hand. Admittedly, on 19/10/1987 at night some incident took place and at about 8.30 pm or so when police went to the place of offence, they found Sanjay Gaonkar lying in a pool of blood just inside the house of Shobhana Parkar. From the inquest panchanama Exh-20 it is also very clear that several incise injuries were noticed on the person of Sanjay Gaonkar. The Prosecution has produced at Exh-48 the postmortem report. In this report, in column No.17 the injuries which were found on the person of Sanjay Gaonkar have been mentioned. The same are as under :-

1)Incised wound 2 cm x ½ cm bone deep going deep in the bone (Maxilla) left.

2)Incised wound 9 cm x 2 cm bone deep, on left mandibular from left angle of mouth to the angle of mandible.

3)Incised wound 1 cm x ½ cm subcutaneous deep left side cervical.

4)Incised wound 1 cm x ½ cm subcutaneous deep right delto-pectoral region.

5)Incised wound 3 cm x 1 cm deep, just below right sternoclavicular joint going laterally deep inside.

6)Incised wound 8 cm x 2 cm deep, just below left

sternoclavicular joint horizontally going medially deep inside.

7)Incised wound 1 cm x ½. cm x subcutaneous deep, on upper sternal region.

8)Incised wound 1 cm x ½ cm x bone deep on midsternal region.

9)Incised wound 1 cm x ½ cm x bone deep lower 1/3 sternal region.

10)Incised wound 1 cm x ½ cm x bone deep, lower sternal region.

11)Incised wound 1 cm x ½ cm subcutaneous deep left cervical.

12)Incised wound 1 cm x ½ cm left cervical.

13)Incised wound 2 ½ cm x 1 cm x ? deep, left pectoral on lateral side in anterior axillary line in 6th intercostal space.

14)Incised wound 2 cm x ½ cm x ? deep left lateral pectoral region in 7th intercostal space.

15)Incised wound 2 cm x ½ cm x ? deep left lateral pectoral region in 6th intercostal space mid axillary line.

16)Incised wound 2 cm x 1 cm elliptical right hypochondriac region 7th intercostal space.

17)Incised wound 4 cm x 1 cm x bone deep, right hypochondriac region mid clavicular on the 6th rib.

18)Incised wound 4 cm x 1 ½ cm x bone deep, elliptical left hypochondriac region.

19)Incised wound 8 cm long x 1 ½ cm x cubsute deep, extended on right side by linear abrasion on the left scapular region.

20)Incised wound 4 cm x 1 ½ cm x deep elliptical on left hypochondriac region going medially deep inside in abdomen.

21)Incised wound 4 cm x 2 cm x ? deep small intestine seen popping through it, left side of the unbillical region.

22)Incised wound 8 cm long x 7 cm wide elliptical web space between thumb and Index finger on left side space completely open thiner muscle exposed.

23)Minor abrasion 7 cm long, on left deltoid region.

24)Incised wound 2 cm x ½ cm x bone deep on right lateral hypochondriac region mid axillary region.

25)Incised wound 3 ½ cm x 1 cm elliptical x subcutaneous deep, on right forearm.

26)Incised wound 1 cm x ½ cm x subcutaneous deep, on right thumb external aspect.

27)Incised wound 2.5 cm long x ½ cm x subcutaneous deep on right lateral abdominal wall midline between cost region and anterial superiar iliac spine.

28)Minor abrasion 7 cm long on right deltoid.

29)Incised wound 1 cm x ¼ cm x subcutaneous deep on back right side lumber region.

30)Incised wound 1 cm x ½ cm x subcutaneous deep, just below above injury.

31)Incised wound 1 cm x ½ cm on right internal deltoid.

Doctor has opined that the death was caused due to terminal cardio respiratory failure due to severe shock due to perforating and penetrating injuries to vital organ.

12. It is an admitted fact that defence did not challenge the said postmortem report. On the contrary, gave its no objection to exhibit the same and read it in evidence. Thus, we find that at no point of time, it has been the case of the defense that death of Sanjay Gaonkar was not homicidal. Having regard to the postmortem report and the evidence on record, the learned Trial Judge rightly recorded the finding that the death of Sanjay Gaonkar was homicidal.

13. The main and the material question is whether the said death was caused at the hands of the accused persons or some of them? In order to prove that the death has been caused at the hands of some of the accused persons, the Prosecution is heavily relying on

the evidence of eye witnesses namely PW-4 complainant Suryakant Ramchandra Phansekar Exh-26, PW-8 Anand @ Anil Murari Raut Exh-33, PW-15 Rajan Waman Angane Exh-51, PW-16 Sudhir Maruti Manjarekar Exh-52. While assessing and evaluating the evidence of these eye witnesses one must bear in mind two principles, namely, whether in the circumstances of the case, it was possible for the eye witnesses to be present at the seen and whether there was anything inherently improbable or unreliable. Creditability of a witness is to be decided by referring to his evidence and finding out how he has fared in cross examination and what impression is created by his evidence taken in manner and context of the case and not by entering into realam of conjecture and speculation. It has been so held in **State of UP V/s. Noori Noorjahan J.T. (1996) 3 SC 570**. From the perusal of the judgement of the Trial Court, we are of the view that the learned Trial Judge has ignored the above mentioned two principles and has unnecessarily given undue importance to minor discrepancies, contradictions, improvements here and there and as a result, reached to a wrong conclusion. We would presently point out how and why we have formed the said opinion.

14. It is the prosecution case that at the relevant time there was an unlawful assembly of accused Nos. 1 to 9 and the common object of the said assembly was to commit murder of Sanjay Gaonkar. However, at the outset it must be mentioned that if we peruse the evidence of the above mentioned 4 eye witnesses then we find that PW-4 complainant Suryakant Phansekar has stated in his evidence about the presence of only accused Nos.1,3 and 7 at the place of offence. PW-8 another eye witness Anand @ Anil Murari Raut Exh-33 has spoken about the presence of only accused Nos.1,3,4 and 7 and PW-15 Rajan Waman Angane Exh-51, the third eye witness has stated about the presence of only accused No.1,3 and 7 at the place of offence. PW-16 Sudhir Maruti Manjarekar Exh-52 has made reference about the presence of accused Nos.1 and 3 only. Thus, we find that none of these eye witnesses has specifically stated that at the relevant time they saw five or more accused persons at the place of offence and they were taking part in attacking Sanjay. So, the learned Trial Judge has rightly observed that the prosecution has failed to prove that at the relevant time, there was an unlawful assembly of five or more persons. So, naturally, the question of accused constituting an unlawful assembly or they being the members of an unlawful assembly does not arise.

There is absolutely no evidence to establish that the accused committed offences punishable under sections 147, 148, 149 of IPC. It is true that in the first information which was given by the complainant to Police vide Exh-28 he had mentioned therein that he saw 5-6 persons, but we can not ignore the fact that as the incident occurred all of a sudden, he had seen some persons chasing Sanjay with weapons in their hands, he might have thought that there were about 5-6 persons but that by itself is certainly not sufficient to jump to the conclusion that the evidence given by the complainant Suryakant Phansekar is not reliable or that he was not present at the place of offence. On the contrary, it must be noted that even in the subsequent detailed information which he has given vide Exhibit-27 and which has been treated as FIR by Police therin also he has named only accused Nos.1,3 and 7 as the persons taking part in the alleged assault. If really he had any intention to rope all the accused and give false evidence against them, then certainly he would have stated accordingly while giving evidence but we find that he has not named the other accused persons.

15. PW-4 complainant Suryakant Ramchandra Phansekar Exh-26 has stated that at the relevant time, he was in

the saloon of Vijay Chavan. At that time, he heard shout “run-run” and when he went outside the shop, he found that accused No.3 Vidhyadhar Sitaram Malkar was chasing Sanjay with sword in his hand and accused No.1 Bhai Wagh and accused No.7 Tulsidas Jagannath Ludbe with accused No.3 and deceased Sanjay entered into the house of Shobhana Parkar. The accused No.3 Vidhyadhar gave a blow with sword to Sanjay. So also accused No.1 Bhai Wagh gave blow to Sanjay with weapon like gupti. The accused No.7 Tulsidas also assaulted him. He has stated that he saw the said incident standing at some distance from the house of Shobhana Parkar. It is pertinent to note that this witness has immediately rushed to the Police Station and informed the police about the alleged assault on Sanjay. When Police asked him to give the information in writing, he did not hesitate but immediately gave the writing Exh-28. The learned Trial Judge has, however, not relied on the testimony of this witness. According to him, this witness if really would have been present there and had seen the entire incident, he would not have failed to mention in FIR Exh-28 the names of accused Nos.3 and 7 who were previously known to him. Merely because names of some of the accused persons are not mentioned in the FIR that does not mean that testimony of the said

witness is not reliable or that he was in fact not present at the place of offence. If at all such test was to be applied the learned trial judge should have at the most held that his evidence is not sufficient to show complicity of accused Nos.3 and 7 but instead the learned Trial Judge has discarded his entire evidence. Firstly, it must be noted that there is no rule of law that if names of some of the accused persons are not mentioned in the FIR then the evidence of such witness who has given FIR should be disbelieved. In fact, it is well settled that the inference arising from the fact that the names of some of the accused are not mentioned in the FIR must vary from case to case. If any authority is needed for this proposition it is reported at **AIR 1974 SC 1936** and **AIR 1974 SC 1978**.

16. In the instant case, one most consider the circumstances under which and the purpose for which this witness Suryakant Phansekar had rushed to the Police Station. It is needless to say that when he had seen some persons with deadly weapons proceeding towards his friend Sanjay and were assaulting him, he must have got scared and perturbed. So, in such state of mental condition he rushed to the Police Station mainly with a view to call police rather than to give

full account of the incident. Even then, we find that though he had not named the accused Nos. 3 and 7 in the said FIR Exh-28, all other material particulars namely the presence of accused No.1 with deadly weapons and the presence of others also with deadly weapons and their assault on Sanjay in the house of Shobhana Parkar has been stated by the said witness. So, under the circumstances, merely because in the FIR there is no specific mention of accused Nos. 3 and 7, we are not inclined to hold that the testimony of Suryakant Phansekar is not reliable. Had it been the case that the complainant Suryakant had stated that only accused No.1 Bhai Wagh proceeded with deadly weapon in his hand, it would have been a different thing. But if we see the tenor of the FIR Exh-28 then it is very clear that the complainant wanted to communicate that persons with deadly weapons amongst whom there was also accused No.1 Bhai Wagh attacked Sanjay. The learned Trial Judge has observed that the complainant Suryakant was admittedly a friend of deceased Sanjay and as such he is interested witness. It must be noted that Suryakant has also canditely admitted that Sanjay was his friend. But at the same time, he has given a reason as to how he was present at the place of offence. He has stated that as usual he had gone to the shop of Vijay Chavan

for reading newspaper. It was tried to be argued on behalf of defence that usually on Monday hair cutting saloons are kept closed. But we can not ignore the fact that it has come on record that on that day the shop was opened for the purpose of lightening. Besides that it has also come on record that some work was also going on in the said shop and one carpenter was present there. Under such circumstances, merely because usually saloon was kept closed on Monday, we can not jump to the conclusion that on 19/10/1987 which was Monday shop of Vijay Chavan was closed. So, we are not at all inclined to give any importance to the argument advanced by the learned Advocate for the defence in this behalf to hold that there was no reason for the complainant to go at the said shop at the relevant time.

17. The learned Trial Judge has observed that there are omissions and contradictions in the evidence of complainant Suryakant Exh-26. According to him, though, the said witness has stated that when he was in the saloon he heard shout “run-run” and hence, he went towards that direction and then he noticed the incident, in his statement before Police he has not stated that at the relevant time he heard the voice

“run-run”. In our opinion, this is a very minor and insignificant omission and no importance can be given to the same. The learned Trial Judge has also observed that in FIR Exh-28 the witness had only mentioned that at the relevant time he saw Bhai Wagh but the complainant has not specifically attributed any overt act to him. It is needless to say that any person who would read Exh-28 as a whole would come to the conclusion that by the said writing complainant wanted to indicate that some persons entered in the house of Shobha Parkar and assaulted Sanjay with deadly weapons like gupti and sword and amongst them there was Bhai Wagh. So, we have no hesitation to hold that learned Trial Judge has not properly considered the contents of FIR Exh-28 and wrongly observed that the complainant has not attributed any overt act to accused No.1 Bhai Wagh. We can not ignore the fact that the complainant is not a highly educated person. He has given information about the incident in the shortest possible manner and naturally, he might not have specifically mentioned that at the relevant time, accused No.1 gave blow with gupti like sword to Sanjay. Similarly, learned Trial Judge has observed that though, the complainant has stated in his evidence that accused No.3 Vidhyadhar was armed with sword, this has not been

stated by him in his statement recorded by Police. It is true that he has not stated before Police that accused No.3 was armed with sword but he has stated in his statement Exh-27 that accused No.3 assaulted Sanjay with gupti. So, merely because there is some difference in the description of the weapons, under the circumstances of the case, that can not be said to be very material nor it can be said that it goes to the root of the matter. In such type of cases, while appreciating the evidence, one should not loose sight of the fact that incident had occurred abruptly and finished within 2-4 minutes. So, under such circumstances, it becomes rather difficult for the witnesses to observe each and every act of each and every assailant minutely and then to depose about the same correctly after lapse of so many days. It must be noted that though the learned Trial Judge observed that in the instant case Exh-28 is the FIR and it is filed earlier in time and Exh-27 is in fact not the FIR but it is a statement recorded by the Police during the investigation, he has compared the contents of the said statement with contents of the FIR which is in fact not permissible in law. The learned Trial Judge has observed that complainant Suryakant Phansekar has given inconsistent information in Exh-28 and 27. This

observation of the learned Trial Judge was uncalled for and is in fact not legal and correct. Thus we find that the learned Trial Judge has not properly appreciated the evidence of the complainant and has rejected his testimony without any valid logical reason. On the contrary, prompt lodging of his FIR clearly indicates that he was present at the place of offence and had seen the incident. His evidence is not at all shaken or shattered in the cross-examination. Merely because deceased was his friend, it can not be said that complainant is an interested witness. It must be held that he is a natural witness. He has not at all made any improvements and exaggeration in his evidence and on the contrary restricted to the incident which he had actually seen.

18. Another important eye witness examined by the Prosecution is PW-8 Anand @ Anil Murari Raut Exh-33. He has also stated that on the day of incident at about 6.00 pm he and his friend Rajan Angane had gone for stroll to JETY on seashore and thereafter, they returned at about 7.30 pm or so and then he, Rajan Angane and Sanjay were chit chatting near the Kishor Cycle Shop. This statement of this witness is also corroborated by the complainant. He has also stated

that at the relevant time, he had seen the above mentioned 3 persons chit-chatting near Kishor Cycle Mart. This witness has further stated that at the relevant time he heard shout “धरा-धरा“ (catch-catch)' and then accused No.1 came running towards house of Shobhana Parkar and accused No.3,4 and 7 chased him and accused No.1 Wagh gave a blow with sword on the neck of Sanjay. He has also stated that weapon before the Court is the same. The learned Trial Judge has observed that there are some omissions in his evidence because this witness has admitted in his cross-examination that he had not stated before Police that he and his friend Anil had gone to JETY on seashore. Really such type of omission is not at all material. It has nothing to do with the main incident. Whether this witness and Anil Angane had actually proceeded to Seashore simultaneously or they met each other at different place etc. is not of much importance. What is material is that at the relevant time, the said witness and Anil Angane were present alongwith Sanjay near Kishor Cycle Mart. This witness has been cross-examined at length and attempt was made to bring on record some omissions like that he had not stated before Police that he heard shout “catch-catch”. At the cost of repeatation, it must be said that such omissions are not at all vital

and they do not affect the creditability of the witness as it has no direct connection with the main incident. Similarly, it matters very little whether at the relevant time, he had stated before Police that accused No.1 Bhai Wagh came from particular direction. When the incident has occurred in such manner it is very difficult for any one to state specifically as to from which particular direction accused had come i.e. whether from eastern side or western side. Then again if he had said something in police statement in that behalf and if he states contrary to that while giving evidence defence may argue that there is discrepancy. But no much importance can be given to such discrepancy. The learned Trial Judge has stated that though at the time of evidence this witness has stated that accused No.4 was with accused No.1 at the relevant time, he had not stated accordingly before Police. If he has not named the accused No.4 while giving information to Police then at the most it can be said that his evidence to that extent can not be accepted unless there is other corroboration, but merely because there is some such omission, one can not throw away the evidence of such witnesses in entirety particularly when otherwise the same is quite cogent, consistent with other evidence on record and the story given by

the other eye witnesses. Whatever contradictions have been brought on record in respect of this witness are certainly not material. The observation of the learned Trial Judge that the contradiction brought out on record in cross-examination of Anil Raut affects sub-sratum of prosecution case and renders his evidence doubtful and untrustworthy is certainly not legal and correct, in view of the fact that the contradictions which are brought on record are very minor and insignificant and do not go to the root of the matter.

19. The prosecution witness No.15 Rajan Angane has also stated that at the relevant time, he, Anil Raut, and Sanjay were chit chatting near Kishor Cycle Mart. At that time, Sudhir Manjarekar had also come there but he left within 5-10 minutes to bring cigar and thereafter, accused No.1 came with sword in his hand and accused Nos. 3 and 7 followed accused No.1 and on seeing them and hearing shout “catch-catch” Sanjay started running and accused Nos.1,3 and 7 chased him and when Sanjay was about to enter the house of Shobana Parkar, accused No.1 Bhai gave blow with sword to Sanjay. He has also stated that at that time, after seeing the incident, he rushed to the shop of Kishor Khanolkar and came out of the said shop only after

ascertaining that the accused had disappeared from the said place. This witness is also thoroughly cross-examined and attempt was made to bring some omissions on record but the same were also of minor nature and totally insignificant. It is tried to be shown that when police recorded statement of this witness he had not stated before Police that after the incident started he rushed to the shop of Kishor Khanolkar. Once he had seen the incident from the place where he was standing and thereafter, being scared went to the shop of Kishor Khanolkar, it can not be said that it was necessary for him to state before Police that after seeing such incident, he went to the shop of Kishor Khanolkar. In what direction, he had proceeded after the incident has no much importance. In fact, we find that he had stated that he saw further incident through the chink of the door. In fact, that is why he had not at all given further details about the assault made by the accused in the house of Shobhana Parkar. The learned Trial Judge has observed that in his evidence this witness has stated that he told Police that at the relevant time, he had gone to JETY and then went to the Bharadnaka. However, he had not actually stated accordingly before Police and the said witness has not given any explanation about the said omission. When the

omission itself was so insignificant that there was no need for the witness to give any explanation about the same, it can not be said that such type of omission any way affects the creditability of the witness. According to learned trial Judge this eye witness Rajan Angane has made improvements and there are omissions amounting to contradictions and as such it is not safe to rely on his testimony. However, it is needless to say that it is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case, albeit foolishly. But that does not mean that falsity of testimony in respect of one thing would ruin the evidence from beginning to end.

20. The Prosecution has also placed reliance on another eye witness namely PW-16 Sudhir Manjarekar. He has also stated that on that day at the relevant time, he was at Bharadnaka and at the instance of Sanjay he had gone to bring cigar from the shop of Masurkar. When he returned back within few minutes he found that Sanjay was running and accused Nos.1 and 3 were chasing him and there were some weapons in the hands of accused Nos.3 and No.1. He has also stated that he immediately went to hotel Bhalchandra Krupa and saw the incident from the said hotel. He has categorically stated that

at that time, when Sanjay entered the house of Bhai Salgaonkar, brother of Shobhana Parkar, accused No.1 Bhai Wagh delivered a blow with weapon on the neck of Sanjay and accused No.3 Vidhyadhar also went inside and when Sanjay was lying on the ground he also assaulted him with weapon. The evidence of this witness is also in fact not shaken or shattered in the cross-examination. Merely because he happens to be the relative of deceased Sanjay, it can not be said that he is an interested witness. The learned Trial Judge has observed that this witness has not stated before Police that he had seen the incident from the hotel Bhalchandra Krupa so there is material omission. Besides this, the said witness could not state for what purpose he had initially gone to Bazar and what article was purchased by him. So, learned Trial Judge has held that this shows that the said witness was in fact not present at the place of offence. However, we do not agree with this sort of reasoning. He may not be in a position to remember as to for what purpose he had gone to bazar and thereafter went to Bharadnaka. But he has specifically stated that when he had gone at that place Sanjay had asked him to bring cigar and for that again he had left the place. Merely because he could not give details as to for what purpose he had gone to Bazar it

can not be said that the said witness was not at all present at the place of offence and that he is a got up witness. The learned Trial Judge has also observed that subsequent conduct of this witness appears to be unnatural. Though Sanjay was his relative he has stated that after the incident, he had not gone to his house. But at the same time, it does appear that immediately after the incident he had gone to the hospital. So, under such circumstances, the conduct of this eye witness can not be said to be unnatural. In any event, it is not such, as a result of which it can be said that this witness is a got up witness.

21. From the perusal of the judgement of the Trial Judge it does appear that he has given undue importance to minor discrepancies in the evidence. However, the learned Trial Judge ought to have considered the fact that the Apex Court in **Bharwada Bhoginbhai Hirjibhai V/s. State of Gujarat AIR 1983 Supreme Court 753** has made following observations :-

> *" Overmuch importance can not be attached to minor discrepancies. The reasons are obvious :-*
>
> *(1) By and large a witness can not be*

expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties, therefore, can not be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

(4) By and large people people can not accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is

unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time and duration of an occurrence, usually, people make their estimates by guessing on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by Counsel and out of

nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore, cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses."

22. We have already pointed out as to how the omissions and contradictions that have been considered by the learned Trial Judge are immaterial or insignificant.

23. The learned Trial Judge has observed that there are discrepancies in the evidence of the above mentioned four eye witnesses. However, it must be noted that the said discrepancies are not in respect of material facts of the case. It is well settled that when discrepancies are comparatively of minor character and do not go to the root of the prosecution story, they need not be given undue importance. For this proposition, useful reference can be made to **Jagdish V/s. State of MP AIR 1981 Supreme Court 1167**. Besides, we can not ignore the fact that normally in the deposition of witnesses there are always discrepancies, however, honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time due to mental disposition such as shock and horror at the time of occurrence, and like. In our considered view, the evidence of above mentioned four eye witnesses is in fact, cogent, consistent and convincing. Same is also corroborated with the fact that initially information about the incident has been given to Police within few minutes and even the statement of the complainant was also recorded within two hours from the incident. The evidence of eye witnesses is also corroborated by the medical evidence. Considering the number of injuries

that have been found on the person of Sanjay it is quite evident that he was assaulted by several persons with deadly weapons. So, we are inclined to accept the testimony of the above mentioned four eye witnesses and to hold that the Prosecution has proved that at the relevant time, the accused Nos. 1,3 and 7 had common intention to commit murder and for that purpose, they made conjoint attack with deadly weapons on Sanjay and caused his death.

24. Apart from the direct evidence, the Prosecution has also adduced circumstantial evidence. It is the case of the prosecution that when the accused No.1 was in police custody on 22/10/1987, he made a statement before Police that he would produce gupti concealed in the bushes near the seashore. Police therefore called panchas and recorded statements of accused No.1 in presence of panchas and then accused No.1 led police and panchas to the said place and produced one gupti like sword. The same has been attached by police under the panchanama Exh-25. It has also come on record that the said gupti was sent to C.A. and C.A. reported that blood of 'O' group was found on the same. It has also come on record that the clothes of the deceased were attached and the same were stained with blood of 'O'

group. It was tried to be argued on behalf of the defence that this panchanama and the alleged discovery is bogus. For that purpose, the learned advocate for the accused has drawn our attention to one remand report produced by the IO during the investigation on 28/10/1987. It is true that in that report it is mentioned that as swords and knife and clothes are to be attached further police custody is necessary. It was therefore argued that memorandum of discovery panchanama are antidated. However, it must be noted that in this remand report there is no specific mention of weapon like gupti. What is discovered at the instance of accused No.1 was gupti. As the police were of the view that there are other weapons used in the offence and the same have been concealed, they might have made such report. But that by itself is certainly not sufficient to jump to the conclusion that the above mentioned memorandum and discovery panchanama regarding gupti is false or concocted. Besides this, even if we assume for the sake of argument that the said panchanama is false still that by itself will not change fate of the case particularly when there is clear, reliable direct evidence to show the involvement of the accused Nos. 1,3 and 7 in the alleged crime.

25. It is the prosecution case that when accused was arrested lungi and shirt which were on his person, were attached in the panchanama and there were blood stains on the same. Not only that but it has come on record that when the said clothes were sent to C.A., blood stains were found on the said lungi. The learned Advocate for the defence strenuously argued before us that it has come on record that when the accused was arrested he had some injury and there is nothing on record to show that sample of the blood of accused was taken. So, it was suggested that the blood which was noticed on the lungi may be of accused. However, it must be noted that when specific question was put to the accused No.1 regarding attachment of lungi from his person and blood stains, he has admitted that such lungi was attached from him. He has not at all given any explanation regarding the blood stains which were found on the said lungi. So, under such circumstances, due weightage shall have to be given to the fact that the blood stains which were found on the lungi tallies with the blood group of the deceased. It has also come on record that blood of 'O' group was also found on gupti article-14. So, this also lends support to the prosecution version.

26. The learned Advocate for the defence submitted that in the instant case though according to the prosecution the incident took place in the house of Shobhana Parkar and she had also sustained injury to her arm, she is not examined by the Prosecution. However, it must be noted that in the instant case, Prosecution has in fact examined some other witnesses also but they turned hostile for example PW-6 witness Dilip Girkar Exh-31, PW-11 Dattaram Umaji Khavanekar Exh-39. Prosecution in fact wanted to examine Shobhana Parkar but finding that she was not likely to support prosecution filed pursis that she would not support and has turned hostile and therefore did not examine her. We also can not ignore the fact that the ghastly, gruesome murder had taken place in her house. As a result of the same, she must have been scared and as such finding that the accused persons are likely to go to any length, she might have decided not to support the Prosecution. Considering the evidence of abovementioned four eye witnesses we do not think that non-examination of Shobhana Parkar is fatal to the prosecution. We are therefore of the view that the Prosecution has adduced sufficient evidence to prove beyond reasonable doubt that accused Nos. 1,3 and 7 at the relevant time, chased Sanjay and followed him. When

he entered in the house of Shobhana Parkar, they in furtherance of their common intention assaulted him with deadly weapons like gupti and sword and committed his murder. They in fact butchered him. However, we find that the learned Trial Judge has not properly appreciated the evidence. His entire approach to the case in our opinion was not legal and correct.

27. The case against accused No.2 is that he tried to disappear the evidence of offence of murder. It is the prosecution case that accused No.2 while in police custody made a statement before Police that he burnt the blood stained clothes and would point out the place where the clothes were burnt and accordingly, Police drew the memorandum and then accused No.2 led Police and panchas to the said spot and Police found some ash and burnt pieces of clothes on the same place and they attached the same under the panchanama. However, the evidence with regard to this is certainly not sufficient and the learned Trial Judge has also therefore rightly held that there is no convincing evidence to show that the accused No.2 committed an offence punishable under section 201 of IPC. Similarly, there is no material against the other accused for the offence punishable under section 201 of IPC and all the

accused were rightly acquitted of the offence punishable under section 201 of IPC.

28. Shri Maneshinde, learned Advocate for the accused submitted that this being an appeal against acquittal, the interference by this Court is required only when it appears that the approach of the lower court was perverse and the view taken by the lower court was not at all a possible view. In order to substantiate this proposition he has drawn our attention to various rulings, such as **AIR 1987 SUPREME COURT 1083**, **AIR 1979 SUPREME COURT 1566**, **2005 ALL M.R. (CRI) 35**, **2005 ALL M.R.(CRI)2362**, **2006 ALL M.R.(CRI) 15**. The propositions laid in the above mentioned authorities are not disputed and can not be disputed. In fact, we are conscious of the fact that while considering the appeal against acquittal, it is only when the conclusions drawn by the Trial Court are improbable or perverse then only the appellate court can interfere. In earlier discussion it has been pointed out as to how the learned Trial Judge has failed to take into consideration the principles regarding the appreciation of evidence and how hypertechnical aspects have been considered. The entire approach and the reasoning given by the learned Trial

Judge for rejecting the testimony of four eye witnesses is not only improper but is totally improbable and unreasonable. The learned Trial Judge has not at all made any efforts to disengage the truth from the falsehood if any and to sift grain from the chalf and adopted easy course of holding that the evidence is discrepant and the whole case is untrue. We therefore feel that this is a fit case where in order to do justice it is necessary to interfere with the finding of acquittal recorded by the learned Trial Judge. Hence we pass following order :-

The appeal is partly allowed.

The order of acquittal of accused Nos.2,4,5,6,8 and 9 of all the offences with which they were charged is upheld.

Their bail bonds stand cancelled.

The order of the trial Judge acquitting the accused Nos.1,3 and 7 of the offences punishable under sections 120-B, 147, 148, 452 r/w. 149, 324 r/w. 149, 302 r/w. 149 and 201 of IPC is upheld. However, accused Nos. 1,3 and 7 are convicted for the offences punishable under sections 452 r/w. 34 of IPC and each one of them is sentenced to suffer R.I. For 2 years and fine of Rs. 1000/- in default to suffer R.I. for two months.

Accused Nos. 1,3 and 7 are also convicted for the offences punishable under sections 302 r/w. 34 of IPC and each one of them is sentenced to suffer imprisonment for life and to pay fine of Rs. 5000/- each. Fine if recovered, 50% of the same be paid to the heirs of deceased Sanjay Dinkar Gaonkar.

All substantive sentences to run concurrently.

Accused Nos. 1,3 and 7 are entitled to get set of for the period of detention undergone by them as per section 428 of Cr.P.C.

Accused Nos. 1,3 and 7 to surrender within 6 weeks from today, failing which the Additional Sessions Judge, Sawantwadi to take necessary steps to arrest the accused and send them to jail to undergo the sentence mentioned above.

(D.G. DESHPANDE,J.)

(S.R. SATHE,J.)